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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1960

No. 738

STOY DECKER and ROBERT MATTHEW COX,
Petitioners,

versus

COMMONWEALTH OF KENTUCKY.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

WALTER B. SMITH,
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Louisville 2, Kentucky,
Attorney for the Petitioners.

WESTERFIELD-BOMYE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

Supreme Court of the United States

October Term, 1960

No. _____

STOY DECKER and ROBERT MATTHEW COX, *Petitioners,*

v.

COMMONWEALTH OF KENTUCKY.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

Stoy Decker and Robert Matthew Cox, Petitioners, petition for a writ of certiorari to review the judgment of the Court of Appeals of the Commonwealth of Kentucky.

OPINIONS BELOW.

A Per Curiam opinion of the Court of Appeals of Kentucky was rendered February 16, 1960. A separate opinion was handed down with reference to Floyd Guinn. It is reported in 331 S. W. 2d 886. The Court of Appeals denied a petition for rehearing for the petitioners November 4, 1960, (Appendix B, *infra,* p. 29). A motion requesting a review of the findings of the Court of Appeals of Kentucky by the Su-

preme Court of the United States was made on November 4, 1960, same being granted by the State Court. (Appendix B *infra* p. 29).

JURISDICTION.

The judgment of the Court of Appeals of Kentucky was entered February 16, 1960, and a rehearing denied on November 4, 1960. Motion granted for review entered by Court of Appeals November 9, 1960. (See Appendix A *infra* p. 22).

The jurisdiction of this court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED.

I. Did the action of the Louisville, Jefferson County, Kentucky, Police Officers in searching the automobile unoccupied and unattended but very recently occupied by your petitioners without warrant or incident to arrest, constitute an unlawful search in violation of the Fourth (IV) Amendment to the Constitution of the United States and Section 10 of the Bill of Rights of the Constitution of the Commonwealth of Kentucky?

II. Does the sentence imposed by the State Court upon each of the petitioners, Stoy Decker and Robert Matthew Cox of four (4) years in the county jail and a fine of $2,500 for conviction of a common law misdemeanor constitute the infliction of cruel and inhuman punishment in violation of Amendment VIII

of the Constitution of the United States and Section 17 of the Bill of Rights of the Commonwealth of Kentucky?

III. Did KRS 431.075 or KRS 437.110 control in imposing the penalty and sentence upon each of the petitioners?

AMENDMENTS OF CONSTITUTION AND STATUTES INVOLVED.

Amendment Four (IV) of the Constitution of the United States and Section 10 of the Bill of Rights of the Constitution of the Commonwealth of Kentucky, Amendment Eight (VIII) of the Constitution of the United States and Section 17 of the Bill of Rights of the Constitution of the Commonwealth of Kentucky, KRS 437.110 and KRS 431.075, are involved (Appendix B, *infra*, p. 32).

STATEMENT OF FACTS.

On the night of November 9, 1959, several people were in the 232 Bar on West Jefferson Street, Louisville, Jefferson County, Kentucky. This bar is a rendezvous for taxicab drivers, truck drivers, their girl friends, and many other people. Beer and soft drinks are sold; there are juke boxes, pin ball machines and a few tables around the walls. The building is some 25 feet by 75 or 80 feet. There is a door in front and one in the back near the rest room. This hall is used for dancing and a general loading place for people who come into the 232 Bar.

The happenings of the evening are told by the testimony of the witnesses for the Commonwealth of Kentucky, attempting to prove a common-law conspiracy against Stoy Decker, Robert Matthew Cox and Floyd Guinn.

The indictment is as follows:

"THE COMMONWEALTH OF KENTUCKY
Jefferson Circuit Court, Criminal Division
December Term A.D., 1958

THE COMMONWEALTH OF KENTUCKY

Against

STOY DECKER, ROBERT MATTHEW COX, FLOYD GUINN, and another person or persons, to the Grand Jurors unknown.

The Grand Jurors of the County of Jefferson, in the name and by the authority of the Commonwealth of Kentucky, accuse Stoy Decker, Robert Matthew Cox, Floyd Guinn, and another person or persons to the Grand Jurors unknown of the crime of unlawfully, wilfully, feloniously and corruptly banding themselves together and going forth for the purpose of molesting and intimidating another person, committed in manner and form as follows, to-wit:

The said Stoy Decker, Robert Matthew Cox, Floyd Guinn, and another person or persons to the Grand Jurors unknown, in the said County of Jefferson, on the day of November, 1958, and within twelve months before the finding of this indictment, did unlawfully, feloniously and corruptly confederate and

band themselves together, and agreed and entered into a conspiracy with each other, for the purpose of going forth and molesting and intimidating another, to-wit; Lloyd Alexander, and pursuant to and in furtherance of said conspiracy, did go forth and molested and intimidated the said Lloyd Alexander by beating him with beer bottles, kicking and stomping him, and firing a tear-gas gun in his face;

CONTRARY to the form of the Statutes in such cases made and provided and against the peace and dignity of the Commonwealth of Kentucky.

(s) A. Scott Hamilton,
Commonwealth's Attorney.

WITNESSES:

Thos. Bennie Smith, 1130 Milberry.
Loman Brown, 232 W. Jefferson.
Anna Lois Hutton, 716½ W. Jefferson.
Oscar Kelly Hall, 232 W. Jefferson 130½ S. 3rd.
Ida Mary Winstead, 343 E. Market.
Sgt. 1/C Duane Olin House; Howitzer Co. 3rd Bn. 6th Arm. Cav. Reg. Ft. Knox.
Officers: Lt. Rollie C. Walling; Sgt. Marvin Moore; Walter Zettwoch; Frank Long; Capt. Geo. McAleese.
Lloyd Alexander, Rt. 4 Box 193 Milaca, Minnesota.
George York, 332 W. Jeff.
Leora Baysinger, 305 W. Market.
John Tryone, 13200 Dixie Hgwy."

First, the testimony of Lloyd Alexander, who allegedly was the victim and chief prosecuting witness in this case. It is impossible to completely separate the testimony of Lloyd Alexander as to Robert Matthew

Cox, Stoy Decker and Floyd Guinn. The testimony of Lloyd Alexander concerning them is as follows:

"Mr. Alexander (I T. E. 68, 69 and 70) beginning with Question 19.

"19Q. Now, while you were here in Louisville, did you have occasion to become acquainted with or at least recognize the three defendants over here at the defense table, Mr. Decker on the far left, and Mr. Guinn and Mr. Cox?

A. Well, the first day that they had opened up the strike, Stoy Decker was there with Mr. Tryon and they spoke to me about going on strike and that I shouldn't haul any loads or do any hauling for Frigid Foods Express.

"20Q. Now, that's Decker, you say?

A. Yes.

"21Q. What about Guinn or Cox?

A. I didn't talk with Cox, but I had seen him a couple days later with Stoy Decker.

"22Q. Where did you see him?

A. Well, I was staying there at 13th and Main. I had parked my tractor there and was hanging around more or less, and Stoy Decker and Cox had come up there to negotiate with Fred Ridge, and they was talking to him and passed through the station as I was staying there.

"23Q. Just tell the jury what remarks if any Cox or Decker or Guinn made to you while you were here in Louisville, Kentucky.

"Mr. Myers: Objection, because he never has said that he saw Guinn.

"Mr. Hamilton: Sir?

"Mr. Myers: He never has said he saw Guinn.

"Mr. Hamilton: I said any of them or all of them. Any one of the three or all three.

A. After this one Monday, that Stoy Decker had talked to me, neither one had said anything to me since.

"24Q. Now, will you state again, it's not exactly clear to me, what was said to you on that occasion?

A. Well, they had asked me on that Monday not to haul anything for Frigid Foods or load any trailers for them.

"The Court: 'They,' who do you mean by 'they'?

"Mr. Myers: He's using the word 'they'. We'd like for him to specify.

"The Court: Yes, don't use the pronouns, just use the names of the people.

A. That was Stoy Decker and Mr. Tryon.

"25Q. Do you know who Tryon is?

A. Well, at the time I thought he was an assistant or a business manager or something to that effect anyhow, or negotiate for contracts.

"26Q. You mean with the Teamsters?

A. Yes.

"Mr. Myers: Your Honor, we object to that, to what Mr. Tryon said, because he's not charged with being a party to this conspiracy.

"The Court: Overruled. He said that Decker was there when Tryon talked to him.

"27Q. Will you tell the jury the date or the approximate date when this occurred, that is, the conversation between you and Decker and Tryon, or Decker and whoever else it might have been?

A. Well, this was on Monday afternoon, a week preceding the occurrence of this attack.

"Further the testimony of Mr. Alexander (I T. E. 72) beginning with Question 36:

"36Q. Will you tell us then, Mr. Alexander, on about how many times, if you don't know the exact number of times, you saw either Cox or Decker or Guinn while you were here in Louisville in October and November of 1958?

"His answer is on page 73 in answer to question 38, and we quote through the balance of page 73:

A. Yes, I saw Decker after that about two times.

"39Q. Where did you see him?

A. At the station there at 13th and Main.

"40Q. Was Cox with him on either of those occasions?

A. He was with him at both occasions.

"41Q. Was Guinn with him on any of the occasions?

A. I hadn't seen Guinn before at all.

"42Q. Did they make any statements to you on those occasions?

A. They had said nothing to me whatsoever, probably said hello and that's about all.

"When asked about who he saw on the night of the occurrence, Mr. Alexander said in answer to Question 52 (I T. E. 77):

"52Q. On that night did you see Decker or Cox or Guinn or any one of the three or all of them there at the 232 Bar on West Jefferson Street?

A. I saw Cox and Decker there.

"53Q. What were they doing, if you remember, or if you know?

A. I was sitting to the rear of the bar, which is partitioned off from the front, and as I

was sitting there Cox came to the door and he was looking around through the crowd there, and I thought I could recognize him at first, but I wasn't quite sure. And then he stepped back out and he returned through the rear part of the bar there with Stoy Decker, and I immediately recognized both of them at that time.

"54Q. Now, Decker and Cox are the two men sitting here at the defense table, is that right?

A. That's right.

"Further Mr. Alexander, starting with Question 65 (I T. E. 81), testified:

"65Q. Now, can you tell the jury who beat you or who kicked you or who fired the tear gas into your eyes?

A. Well, I don't recognize the two fellows that beat me with the beer bottles, but I do recognize the fellow that fired the tear-gas gun.

"66Q. All right, who was that fellow?

A. Edgar Cox.

"67Q. Is he the same Mr. Cox sitting here at the defense counsel's table?

A. That's right."

The next witness for the Commonwealth was Thomas Smith, who had three times been convicted of a felony (II T. E. 157). According to Mr. Smith he has known Cox since about 1944 or 1945 and that he had never met Decker before the night in question and that he had never seen or met Guinn until after the overt act (II T. E. 141).

However, Mr. Smith later in his testimony stated that he did see Guinn, however, he does not seem to be able to state definitely when he saw Guinn until after the attack on Alexander.

Smith's testimony as to conspiracy, elicited all the way through by leading questions, is to the effect that Cox told him that he was going to whip Alexander and that Decker offered him (Smith) $10.00 to jump on Alexander, which he refused (II T. E. 143 and 144). Subsequent to the attack Smith testified to seeing and talking to Cox, Decker and Guinn. His conversation and actions subsequent to the attack will be discussed later in the individual facts. Smith by his statement had been drinking all of the Sunday afternoon preceding the incident in this case. He stated that he had been going from joint to joint drinking. He also has a complete lapse of memory until he describes the conversation around the pin ball machine (II T. E. 163, 164 and 165). It is obvious that Mr. Smith gave conflicting statements to the police, before the grand jury and on the trial of this case (II T. E. 183 and 184).

Further, another witness for the Commonwealth is Loman Brown, whose testimony, in answer to leading questions, consists of his statement that Cox asked him if he knew a truck driver (II T. E. 200) and a statement that Cox said that the truck driver was getting ready to move a load and that "we are going to stop him" (II T. E. 201). On the same page Brown said that Cox would use a gas gun if necessary to stop the moving of a load. At the time this was a personal conversation between Cox and Brown, according to Brown. Brown on page 202 of his testimony describes Cox introducing Decker to him near a pin ball machine in the 232 Bar, and that Cox showed him, Brown, a gas gun and that Decker was present and saw it. On page

203 of Brown's testimony with Mr. Hamilton, the Commonwealth's Attorney, making statements and asking the witness, Brown, if they were true, Brown got around to saying that Decker made the statement "he will have to learn".

And a further witness, Oscar Kelley Hall, who states that he saw four men standing at a pin ball machine at the 232 Bar in conversation, at first he said he saw Decker and Cox come into the bar, and that 15 to 20 minutes later Smith and a person he did not know came in. The only conversation he heard was Cox introduce Decker to Loman Brown (II T. E. 229).

Another witness, Ida Mary Winstead, who did not give any testimony concerning a conspiracy, but tried to implicate Mr. Decker in an attempted bribery because of the fact that after he was arrested and in an attempt to determine facts of the case she testified to seeing money sticking out of Mr. Decker's inside coat pocket but she admitted none was offered to her (II T. E. 242).

So the testimony introduced to attempt to show a conspiracy was by Lloyd Alexander, a man who spent time in the Federal penitentiary as a draft dodger; and still another witness, Thomas Smith, who was drunk on the occasion and so has been convicted of a felony; Loman Brown, the bouncer; and Oscar Kelley Hall, the bartender.

The Testimony Concerning Stoy Decker.

Lloyd Alexander testified he had seen and talked to Stoy Decker on Monday a week preceding the attack (I T. E. 70), and there saw him "about two times" (I T. E. 73), and that all that was said was "hello".

He stated he saw Decker in company with Cox at the 232 Bar on the night of the attack (I T. E. 77). This is all the victim had to say of the accused. He neither implicates Decker in any conspiracy nor subsequent overt act.

Smith as to Decker (II T. E. 142) says Cox introduced him to Decker the night of the attack at the 232 Bar, and that he had not theretofore known him. Smith claims Decker offered him $10.00 to whip Alexander which he, Smith, refused (II T. E. 143). Smith heard nothing else concerning Decker and in fact placed him out of reach of the fight (II T. E. 145 and II T. E. 176). Smith later that night saw Guinn and Decker and asked them to move his car from in front of the 232 Bar because he, Smith, was afraid (II T. E. 151). Guinn and Decker did move his car.

Loman Brown Concerning Decker (II T.E. 199).

Brown says he was introduced to Decker by Cox in the 232 Bar, that Decker was present at the pin ball machines in the Bar when Cox displayed a tear-gas gun (II T. E. 202).

He did not see Decker at the time the fight took place (II T. E. 204).

Oscar Kelley Hall Concerning Decker (II T.E. 228).

He saw Decker and Cox come into the Bar first and 15 to 20 minutes later Smith and a person he did not know came in.

He saw all four standing at the pin ball machine.

He heard no conversation except Cox introduce Decker to Brown.

He said Decker left three minutes before the fight and 30 to 40 minutes later he saw Decker and Guinn drive away in Smith's car (II T. E. 230).

The Testimony Concerning Robert Cox.

Commonwealth's witness, Alexander, said he had first seen Cox at 13th and Main Streets in Louisville, Kentucky, a week preceding the incident in this case and that Cox had had no conversation with him (I T. E. 68 and 73).

He next stated that he saw Decker and Cox at the 232 Bar (I T. E. 77).

He did identify Cox as the man who fired the tear-gas gun.

The Testimony of Commonwealth's Witness, Thomas Benny Smith, Concerning Cox.

Smith related that he had known Cox for a number of years and that he saw him in the 232 Bar on the night of November 9, 1958 and the early morning of November 10th (I T. E. 142). Smith relates that Cox informed him that there was a truck driver in the 232

Bar that he was going to whip and that Cox introduced him to Decker at that point (I T. E. 143).

Smith relates that he saw Robert Cox assault Alexander (I T. E. 144).

The remainder of Smith's conversation concerning Cox is after the assault.

Smith says that he got into a car with Cox and others and drove away immediately following the assault. He then states that he went with Cox and this man "Jim" to Cox's home in New Albany and that he spent the rest of the night at that point and that Cox brought him back to Louisville on the morning of the tenth. Smith then on questioning by the Commonwealth introduced information meant to convey that Cox had put sugar into the tractor of the gas tank of Alexander (I T. E. 152).

All the objection would not keep the Court from permitting the testimony into the record. The testimony concerned a conversation purportedly that Smith had with Cox after the incident and if it were true, constituted completely different events from that which Cox was being tried, and to have tried Cox for conspiracy against property would have required a different indictment.

The Testimony of Loman Brown Concerning Cox.

Brown, a witness for the Commonwealth, testified he had known Cox for twelve years (I T. E. 99) and that he saw Cox at the 232 Bar on the night in question (I T. E. 200). Brown testified that Cox came in and asked him if he knew a truck driver whom Brown

said, at the time of the trial, he then knew to be Alexander (I T. E. 200, 201). Brown claims that Cox told him that they were going to stop Alexander from moving a load (I T. E. 201). That Cox told him that he had a gas gun and he would use it if necessary to stop the man from moving a load (I T. E. 201). Brown again claims that he saw Cox with a gas gun talking to Decker in front of a pin ball machine at the 232 Bar (I T. E. 202). Brown says Cox fired the tear-gas gun in the actual overt act (I T. E. 204).

Brown says he saw Cox run away after the fight (I T. E. 205). Brown says that Cox asked him if he could use a tear-gas gun in the bar and that Brown told him he could not.

Brown testified that after all this conversation with Cox that Cox later discussed things in his presence where Mr. Decker was present.

The Testimony of Oscar Kelley Hall, Witness for the Commonwealth, Concerning Cox.

He saw Cox come into the Bar (I T. E. 229). He heard Cox introduce Decker to Loman Brown (I T. E. 229).

The Search and Seizure of the Tear-Gas Gun Is As Follows:

Joseph Biven was a member of the Louisville Police Department on November 10, 1958, and his testimony is as follows concerning the taking of the tear-gas gun:

"BIVEN—dir.

"10Q. Did you look in the automobile that Decker and Guinn were in?

"A. Yes sir.

"11Q. Let me show you this tear-gas gun here and ask you if you found it?

"A. Yes, sir.

"12Q. Where did you find it?

"A. It was underneath the front seat on the passenger's side, right below the covering.

"Mr. Higgins: Judge, I introduce that, whatever the next number is.

(The tear-gas gun above referred to was marked Commonwealth's Exhibit 4 for indentification, and was received in evidence.)"

(Vol. II, T. E. p. 252.)

"31Q. And at that time you were on the police force?

"A. Yes, sir.

"32Q. You are not now?

"A. No, sir.

"33Q. When did you quit?

"A. I resigned as requested, in other words, I was fired (Vol. II, T. E. p. 255)."

And further on page 259-260 of the T. E. Vol. II:

"Reynolds—dir, cr. by Mr. Myers:

"8Q. He told you he had never seen the gun?

"A. That's right, he had no knowledge of it.

"9Q. Had any charges been placed against Decker or Guinn at that time?

"A. I don't know if they were at that time or not. I did not—I just questioned these men in reference to that.

"10Q. Were they present when the car was searched or were they in the hospital when it was searched?

"A. While I was talking to Mr. Guinn and Mr. Decker, Officer Biven brought the gun in. I don't know if they searched the car in their presence or not, because—

"11Q. Did anybody have a search warrant for the car?

"A. I don't know if they did or not. I wasn't out there when the car was searched.

"12Q. And no warrant of arrest was issued for anybody at that time that you know of?

"A. Not to my knowledge, no.

"13Q. You didn't place them under arrest?

"A. I did not.

"14Q. And you turned them loose, told them they could go?

"A. I did, yes, I did."

(Witness excused.)

(Vol. II, T. E. pp. 259, 260.)

REASONS FOR GRANTING THE WRIT.

1. The decision below is in conflict with Harris v. United States, 331 U. S. 145, a conviction based on evidence obtained in violation of rights of accused under the Fourth Amendment cannot be sustained. The search of the car was made without a warrant; the search was not made incident to an arrest. The car which had been recently occupied by Decker and Guinn was searched by a police officer and a tear gas gun was found and later introduced in evidence, fired before the Jury which caused the Jury to return a verdict of

guilty against Decker who did not have anything to do with the gas gun. The decision below is in conflict with the case of United States v. Rabinowitz and further in the case of Elkins v. United States, No. 126; and Reos v. United States, No. 52, (June 27, 1960), this Court in a vote 5 to 4 set aside the old silver platter doctrine wherein Federal prosecutors in the past could use evidence unlawfully obtained by state and local officers and handed to Federal officials on a "silver platter." The new rule established sets forth that state obtained evidence must meet the test of the Fourth Amendment guaranteed against unreasonable search and seizure, and three days prior to the rendition of this opinion in the case of Commonwealth of Kentucky v. William Edgar Roby, cited June 24, 1960, the Court of Appeals of Kentucky held, "if an officer stops a motorist without a bona fide cause, any evidence obtained as a result of the stopping should be considered to have been illegally obtained and there inadmissible; thus, the holding in these respective cases make the decision in the Court of Appeals of Kentucky in direct conflict with the present law of search and seizure. The decision below is in conflict with United States v. Rabinowitz, 339 United States 56.

2. The decision below also conflicts in principle with the decision of this court with reference to the infliction of cruel punishments. The Late Judge Porter Sims, in speaking of cruel punishments restrictions, in the State and Federal Constitutions: "In the leading case of Weems v. United States, 217 U. S. 349, the Supreme Court declared: 'It is a precept of justice

that punishment for crime should be graduated and proportioned to offense, and laid it down that in order to justify a Court in declaring any punishment to be cruel and unusual with reference to its duration, it must be so proportioned to the offense committed that it shocks the moral sense of all reasonable men as to what is right under the circumstances, No Court has ever attempted to closer define the scope so far as we are aware."

In this case the sentence imposed is a four-year jail sentence and a fine of $2,500 for each petitioner. The fine is excessive. It could mean an additional three years and 155 days, or a total of seven (7) years 155 days as the punishment. Thus, the imposition of such punishment is cruel and inhuman.

3. The Kentucky Legislature, three and one-half years after the decision in the Weber case, 196 S. W. 2d 465, passed KRS 431.075 wherein it was provided that where any person convicted of a criminal offense the penalty for which is not otherwise provided by statute shall be imprisoned in County Jail for a term not exceeding 12 months or fined a sum not exceeding $5,000, or both. We say that the penalty imposed under KRS 437.110 is the common-law penalty and as such should be controlled by KRS 431.075. No Federal Judge ever imposes any sentence in excess of 12 months in jail. If the punishment should be greater, the defendant is sent to a Federal prison. Thus, the decision below also conflicts in principle with the decision of this Court. Supra.

CONCLUSION.

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

WALTER B. SMITH,
Columbia Building,
Louisville 2, Kentucky,
Attorney for the Petitioners.

APPENDIX A.

COURT OF APPEALS OF KENTUCKY

STOY DECKER and ROBERT MATTHEW COX, - *Appellants,*

v.

COMMONWEALTH OF KENTUCKY, - - - *Appellee.*

NOTICE.

Filed November 4, 1960.

TO: Honorable John B. Breckinridge, Attorney General; Honorable Troy D. Savage, Assistant Attorney General, Counsel for Appellee, Capitol Building, Frankfort, Kentucky.

You will please take notice that the attached Motion will be brought on for hearing before Honorable Robert A. Bird, Chief Justice of the Court of Appeals, forthwith in his chambers or such other time as may be convenient with the Court.

(s) WALTER B. SMITH,
Attorney for Appellants.

MOTION FOR STAY PENDING REVIEW BY SUPREME COURT OF THE UNITED STATES.

TO: Chief Justice of the Court of Appeals of Kentucky:

Comes the appellants, Stoy Decker and Robert Matthew Cox, by counsel and move the Court to stay the issuance of a mandate in the above styled case wherein an opinion was rendered this the 4th day of November, 1960, and issue an order staying the execution and enforcement of said mandate for a period of forty-five (45) days from date in order that a proper and adequate application for an appeal be made to a Justice of the Supreme Court of the United States for a review of the above styled case.

Counsel for the appellants further moves this Court to permit the appellants to remain on the present bond during the stay pending the review by the Supreme Court.

Counsel further states that an adequate security for the cost will be posted in compliance with the order of this Court.

The above motion is made by favor of Rule 1.345 of Rules of the Court of Appeals of Kentucky.

This motion for a stay pending review by the Supreme Court is made because the appellants have been deprived of their substantial and civil rights, as well as being in direct conflict with the Eighth Amendment of the Constitution of the United States, and for other reasons which will be set forth by the appellants when the application for the appeal is made to a Justice of the Supreme Court.

(s) WALTER B. SMITH,
Attorney for Appellants.

CERTIFICATE.

This is to certify that a copy of the Notice and Motion herein were delivered to the Office of the Attorney General, Honorable John B. Breckinridge, at 10:00 A.M., November 4, 1960.

(s) WALTER B. SMITH

ORDER STAYING EXECUTION AND ENFORCEMENT OF MANDATE.

This cause having come on for hearing, upon the application of appellants for a stay of the enforcement and execution of the mandate pending an application for an appeal to be made to a Justice of the Supreme Court, and the Court, being advised, orders that the motion therefor be sustained, and the stay of execution and enforcement of the mandate is granted for a period of forty-five (45) days from this date.

It appearing to the Court that appellants are already on bond, no additional security is required.

IT IS SO ORDERED.

Entered this 10th day of November, 1960.

(s) Robert B. Bird, Chief Justice,
Court of Appeals of Kentucky.

NOTICE—MOTION—CERTIFICATE.

TO: Honorable John B. Breckinridge, Attorney General,
Honorable Troy D. Savage,
Assistant Attorney General,
State Capitol,
Frankfort, Kentucky.

Please take notice that on Friday, December 23, 1960, before a Judge of the above Court, at 10:00 A.M., Eastern Standard Time, or as soon thereafter as they may be heard, the appellants will make the following motion as set out herein, and said motion will be filed for submission to said Judge in the office of the Clerk of the Court of Appeals.

MOTION FOR EXTENSION OF TIME FOR A PERIOD OF FORTY-FIVE (45) DAYS STAYING ENFORCEMENT AND EXECUTION OF MANDATE IN THE WITHIN CASE.

Comes the appellants by counsel and move the Court to grant an extension of forty-five (45) days from December 26, 1960, to February 8, 1961, for a stay of the enforcement and execution of the mandate in the within style case for the purpose of filing an appeal to be made to a Justice of the Supreme Court for the following reasons:

1. Counsel for the appellants is involved in trial of cases through the 22nd of December, 1960.

2. This being during the Holiday Season it is almost impossible to devote one's time to the preparation of an exacting pleading necessary to file in the within case.

3. Current matters and the preparation for trial of three other very important cases make it extremely difficult to prepare and file the appeal necessary in the within case at this time.

Thus counsel for the appellants respectfully requests that this stay be extended forty-five (45) days from the 26th day of December, 1960, to February 8, 1961.

This motion is made under favor of Rule 1.345(b) of The Rules of the Court of Appeals of Kentucky.

Dec. 22, 1960.

Respectfully submitted,

(s) WALTER B. SMITH,
Attorney for the Appellants.

CERTIFICATE.

A copy of the within Pleadings was on December 22, 1960, personally delivered to the office of the Attorney General and left at the office of Honorable Troy Savage.

Given under my hand this December 22, 1960.

(s) WALTER B. SMITH,
Attorney for Stoy Decker and Robert Matthew Cox, Appellants.

OFFICE OF
CLERK OF COURT OF APPEALS
FRANKFORT

December 29, 1960

Hon. Walter B. Smith
Attorney at Law
Columbia Building
Louisville 2, Kentucky

Hon. John B. Breckinridge
Attorney General
Capitol Building
Frankfort, Kentucky

Hon. Troy D. Savage
Assistant Attorney General
State Capitol Building
Frankfort, Kentucky

In re: Decker, et al vs. Commonwealth of Kentucky

Gentlemen:

Appellants' motion for extension of time of 45 days or until February 8, 1961, staying enforcement and execution of mandate has been SUSTAINED by the Court.

Very truly yours,

(s) Doris Owens, Clerk
(s) By: Drexell R. Davis
Deputy Clerk

APPENDIX B.

Rendered: February 5, 1960.

STOY DECKER and ROBERT MATTHEW COX, - *Appellants.*

v.

COMMONWEALTH OF KENTUCKY, - - - *Appellee.*

APPEAL FROM THE JEFFERSON CIRCUIT COURT,
CRIMINAL BRANCH—SECOND DIVISION
HONORABLE L. B. CURTIS, JUDGE.

PER CURIAM.

Appellants, Stoy Decker and Robert M. Cox were found guilty on a charge of conspiracy under KRS 437.110. The punishment of each was fixed at a fine of $2,500 and imprisonment in the county jail for a period of four years.

They have moved for an appeal and are claiming divers errors.

It will be noted that Floyd Guinn was convicted with Decker and Cox and that his appeal is handled in a separate opinion of this date.

Upon examination of the record we find no prejudicial error as to these appellants. The motion for appeal is therefore denied and the judgment of the trial court is affirmed as to them.

Attorneys for Appellants:
RALPH H. LOGAN,
HARDY & LOGAN,
506 Jefferson Street,
Louisville, Kentucky.

Attorneys for Appellee:
JO M. Ferguson, Attorney General,
DAVID SEBREE, Asst. Atty. General,
Frankfort, Kentucky.

Commonwealth of Kentucky }
Court of Appeals } Set.

I, Doris Owens, Clerk of the Court of Appeals of Kentucky, certify that the foregoing is a true and correct copy of the Per Curiam Order delivered by the Court of Appeals on February 5, 1960, in the case of Stoy Decker, and Robert Matthew Cox, appellants versus Commonwealth of Kentucky, Appellee, appeal from Jefferson Circuit Court, Criminal Branch, Second Division, as the same appears from the records and files of my office.

Witness my hand and seal, this the 1st day of February, 1961.

(s) Doris Owens,
Clerk of the Court of Appeals of Kentucky.

(Seal)

331 S. W. 2d p. 886

FLOYD GUINN, - - - - - - - *Appellant,*

v.

COMMONWEALTH OF KENTUCKY, - - - *Appellee.*

Court of Appeals of Kentucky
February 5, 1960

PROSECUTION FOR CONSPIRACY.

Prosecution for conspiracy. The Circuit Court, Jefferson County, Criminal Branch, Second Division, L. R. Curtis, J., entered judgment of conviction and defendant moved to appeal. The Court of Appeals, Bird, J., held that evidence which contained no proof of any act, statement or circumstance creating more than a suspicion of defendant's complicity as a conspirator was insufficient to sustain conviction.

Motion for appeal granted and judgment reversed.

CONSPIRACY KEY 47

Evidence which contained no proof of act, statement or circumstance that created more than a suspicion of defendant's complicity as a conspirator was insufficient to sustain conviction. KRS 437.110.

Ralph H. Logan, Hardy & Logan, Rush Nicholson, Louisville, for appellant.

Jo M. Ferguson, Atty. Gen., David Sebree, Asst. Atty. Gen., for appellee.

BIRD, Judge.

Appellant, Floyd Guinn, was found guilty of conspiracy under KRS 437.110 and his punishment was fixed at a fine of $300 and imprisonment in the county jail for a period of two years. He has moved for an appeal.

Appellant was convicted with Stoy Decker and Robert M. Cox whose sentences have this day been upheld by this Court. As to this appellant, however, we have concluded that the evidence was insufficient and that appellant should have been given a directed verdict. We have carefully examined the lengthy record and it discloses barely enough to create a suspicion of appellant's participation in the conspiracy. This appellant and his co-defendants were seen together on the night of the crime and it is shown that they were associates having mutual interests in the subject out of which the trouble arose. However, there is no proof of act, statement or circumstance that creates more than a suspicion of his complicity as a conspirator. This will not sustain a conviction and a directed verdict should have been given for this appellant. Baird v. Commonwealth, 241 Ky. 795, 45 S. W. 2d 466; Gammons v. Commonwealth, Ky., 305 S. W. 2d 932.

The motion for appeal is granted and the judgment is reversed for proceedings not inconsistent with this opinion.

ORDERS—KENTUCKY COURT OF APPEALS
Fall Term, November 4, 1960

Decker & Cox v. Commonwealth — Jefferson

The Court being sufficiently advised, it is considered that the petition of appellants for a rehearing be and the same is overruled.

Commonwealth of Kentucky }
Court of Appeals } Sct.

I, Doris Owens, Clerk of the Court of Appeals certify that the above is a true and correct copy of the order overruling the petition for rehearing filed in the case of Decker & Cox, Appellants versus, Commonwealth of Kentucky, Appellee, in an appeal from the Jefferson Circuit Court, Crim-

inal Branch, Second Division, as the same appears from the records and files of my office.

Witness my hand and seal, this the 1st day of February, 1961.

(s) Doris Owens,
Clerk of the Court of Appeals of Kentucky.

(Seal)

APPENDIX C.

Pertinent Portions of the Constitution of the United States.

AMENDMENT IV.

"Searches and Seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT VIII.

"Punishment for Crime.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Pertinent Portions of the Constitution of Kentucky.

Section 10 of the Bill of Rights.

Security from search and seizure; conditions of issuance of warrant. The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

Section 17 of the Bill of Rights.

Excessive bail or fine, or cruel punishment, prohibited. Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishment inflicted.

KRS 431.075 COMMON-LAW OFFENSES, PENALTIES FOR:

Any person convicted of a common-law offense the penalty for which is not otherwise provided by statute shall be imprisoned in the County Jail for a term not exceeding twelve months or fined a sum not exceeding five thousand dollars or both (*1950*, c. 169).

KRS 437.110 (1241a-1; 1241a-2) CONSPIRACY: BANDING TOGETHER FOR UNLAWFUL PURPOSES:

(1) No two or more persons shall confederate or band themselves together and go forth for the purpose of intimidating, alarming, disturbing or injuring any person, or of taking any person charged with a public offense from lawful custody with the view of inflicting punishment on him or of preventing his prosecution, or of doing any felonious act.

(2) No two or more persons shall confederate or band themselves together and go forth for the purpose of molesting, damaging or destroying any property of another person, whether the property is molested, damaged or destroyed or not.

(3) Any person who violates this section shall be punished by fine or imprisonment, or both, in the discretion of the jury. (*1948*, c. 22).

[redacted] ILE COPY

No. 738

Office Supreme Court, U.S.
FILED
MAR 17 1961
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

TROY DECKER and
ROBERT MATTHEW COX — PETITIONERS

VS — RESPONSE TO PETITION FOR WRIT OF CERTIORARI

COMMONWEALTH OF KENTUCKY — RESPONDENT

JOHN B. BRECKINRIDGE
ATTORNEY GENERAL

TROY D. SAVAGE
ASSISTANT ATTORNEY GENERAL

COUNSEL FOR RESPONDENT

Copy of within response to petition for writ of certiorari mailed to Hon. Walter R. Smith, Attorney for Petitioners, Columbia Building, Louisville 2, Kentucky

This the 16th day of March, 1961

Assistant Attorney General

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IN THE

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ROBERT MATTHEW COX ..... PETITIONERS

VS. **RESPONSE TO PETITION FOR WRIT OF CERTIORARI**

COMMONWEALTH OF KENTUCKY ..... RESPONDENT

RESPONSE NO. 1

THE PETITIONERS HAVE NOT COMPILED WITH RULE 23. 1(f) OF THE UNITED STATES SUPREME COURT.

Comes now the respondent, Commonwealth of Kentucky, and for the first response to appellant's petition for writ of certiorari states the petitioner's request for a writ of certiorari should be denied because he has failed to comply with the rules of this Court in that he has failed to specify the stage in the proceedings in the court of first instance, and in the Appellate Court at which, and the manner in which, the Federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court, with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the Federal question was timely and

properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari. Rules of the U.S. Supreme Court Rule 23, 1(f).

RESPONSE NO. II

NO FEDERAL QUESTION RESERVED OR PASSED UPON BY THE STATE OF KENTUCKY'S COURTS

Even if the petitioner had attempted to comply with U.S. Supreme Court Rule 23, 1(f), it would not have been possible because the two Federal questions set out in this petition for a rehearing, at pages 2 and 3 thereof, were not timely raised in the Jefferson Circuit Court (the trial court), nor were they preserved and presented to the Court of Appeals for the State of Kentucky, nor were they passed upon by the Court of Appeals of the State of Kentucky.

The second constitutional question alleged to have been violated by the courts of the State of Kentucky, to wit, that the imposition of a $2,500 fine and four years in the county jail amounts to cruel and inhuman punishment in violation of Amendment Eight of the Constitution of the United States, was not raised at all in the circuit or lower court of the State of Kentucky and was first mentioned in the Court of Appeals of the State of Kentucky in a petition for a rehearing.

A question first raised in a petition for rehearing in the state's highest court is not timely and the Supreme Court will not take jurisdiction of that issue. Hanson v. Denckla, 78 S.Ct. 1228, 357 U.S. 235, 2 L ed 2d 1238, rehearing denied 358 U.S. 858.

The other purported Federal constitutional question set out by the petitioner at page 2 of his petition, to wit, that the introduction in evidence of a teargas gun obtained by a search of an automobile at a time when the petitioners were not under arrest deprived these petitioners of their guarantee against unlawful search and seizure under the Fourteenth Amendment to the U.S. Constitution, was not properly preserved in the lower court as no objection was made to the introduction of this evidence at the time it was introduced. See the evidence set out in the petition for writ of certiorari at pages 15, 16 and 17.

That a petitioner waives his right to object to the introduction of evidence obtained under an illegal search and seizure by failure to object at the time of its introduction is well established. Eleazar v. U.S., C.A., Alaska, 1956, 241 F.2d 385; Honig v. U.S., C.A., Mo., 1953, 208 F. 2d 1916, and many other cases.

The law is the same in the State of Kentucky. Minch v. Commonwealth, 207 Ky. 417, 269 SW 315; Hoover v. Commonwealth, 214 Ky. 24, 278 SW 549; Illinois Central Railroad v. Commonwealth, 25 KLR 297, 74 SW 1097.

The third question set out in the petition for a rehearing concerns the interpretation and application of Kentucky statutes and does not involve any Federal question.

That upon a petition for writ of certiorari from a judgment of the state courts the Federal question must have been raised and decided by the state courts before the U.S. Supreme Court will take jurisdiction, is not subject to question at this time, having been decided on many occasions. Walters v. City of St. Louis 347 U.S. 231, 28 U.S.C.A., § 1257; Hanson v. Denckla, supra; City of Tacoma v. Taxpayers of Tacoma, 202 U.S. 446; Bell Telephone Co. of Nebraska v. Ry. Commissioners, 297 U.S. 471.

The best that can be said in the instant case is that the Court of Appeals for the State of Kentucky, the highest court in said state, ruled by inferences any Federal constitutional questions that may have been before it as this Court did not write an opinion but merely ruled on a motion of these petitioners for an appeal to it, overruling said motion. See page 26 of petitioners' petition for writ of certiorari, for excerpt of opinion.

RESPONSE NO. III

CASE IN COURT BELOW DECIDED ON ADEQUATE NON-FEDERAL QUESTIONS.

As stated above, the question of cruel and inhuman punishments was not raised in the state courts except in a petition for a rehearing in the state's highest court, the Court of Appeals. The other Federal question—deprivation of protection against illegal search and seizure by introduction of evidence obtained through

alleged illegal search—was not presented to the Court of Appeals as a Federal question, but was presented and argued in the briefs on the issue of the preservation of the error in the lower courts by the accused making a motion at the close of his cross examination of the witness introducing the alleged incompetent evidence when it was and is admitted that there was no objection made at the time the alleged incompetent teargas gun was introduced. The attorney for the present petitioners, at the trial in the lower court in the State of Kentucky made no objection to the introduction of the teargas gun, nor did he object to the demonstration performed before the jury by the use of the teargas gun, but elected to cross examine the witness at length concerning the teargas gun and other items of personalty found in the automobile, especially a knife found therein at the time of the search, and having failed to elicit anything of value favorable to his clients by said cross examination, moved that the evidence concerning the teargas gun be excluded. The law is well settled in this state that this is not a timely objection. Minch v. Commonwealth, 207 Ky. 417, 269 SW 315; Hoover v. Commonwealth, 214 Ky. 24, 278 SW 549.

This issue of whether or not the motion to exclude the evidence was a timely objection to its introduction, or conversely stated: Did the failure to object at the time of the introduction of the alleged competent evidence because of it having been obtained by illegal search waive their right to have it excluded?—is a question not even involving a section of the Kentucky State Constitution, but concerns a state procedural matter and cannot, in any sense, be considered a Federal question.

We assume that the Court of Appeals, by denying the present petitioners' motion in that Court for an appeal, impliedly ruled upon the issue of the proper exclusion of this item of evidence that is to say, they impliedly ruled that by failure to object they waived their right to object to the competency of this evidence on the ground it was acquired by improper search, but even so, it only involves a state procedural question.

CONCLUSION

For the above reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN B. BRECKINRIDGE
ATTORNEY GENERAL
BY: Troy D. Savage
TROY D. SAVAGE
ASSISTANT ATTORNEY GENERAL

COUNSEL FOR RESPONDENT